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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-678

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellant,

v.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal From The Supreme Court Of California

REPLY BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY TO MOTION TO DISMISS APPEAL OR AFFIRM

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THIS COURT HAS JURISDICTION

Contrary to the view expressed by the City of San Diego (hereinafter referred to as the "City") in its Motion to Dismiss Appeal or Affirm (hereinafter referred to as the "Motion") this Court does have jurisdiction of the appeal by San Diego Gas & Electric Company (hereinafter referred to as the "property

owner") under 28 U.S.C. § 1257(2), as amply demonstrated in the Jurisdictional Statement and Appendix already filed with the Court (hereinafter referred to as "J.S." and "J.S.App.").

To demonstrate that the City's contention is totally without merit, property owner will reiterate and show that it has consistently and specifically challenged the validity of the "state statutes" throughout the long procedural history of this case and that the state court has sustained their validity against the allegation that such statutes are repugnant to the Federal Constitution.

1. The Property Owner Has Specifically Challenged The Validity Of "State Statutes."

The definition of the phrase "statute of any state" used in 28 U.S.C. § 1257(2) has been defined many times by this Court and has been interpreted as "broadly comprehending any legislative proceeding from the law-making agencies of the state. . . ." *King Manufacturing Co. v. City Council of Augusta,* 277 U.S. 100, 102 (1927). This Court there stated that the acts of a subordinate instrumentality of the state, exercising delegated legislative authority, such as a municipality adopting an ordinance, are "state statutes" for jurisdictional purposes.

> [t]he jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction. 277 U.S. at 104.

It is the "legislative character" of the act which is the decisive factor in determining whether the order is a "statute" for 28 U.S.C. § 1257(2) purposes. In resolving this issue in specific cases this Court in the past has found a municipal ordinance "passed under authority delegated by the legislature" to be a "state statute." *Reinman v. Little Rock,* 237 U.S. 171, 176 (1915). It has delineated the characteristics of a "statute" as, a provision or enactment of a subordinate instrumentality of a state which "ordains, permits or prohibits," a rule "intended to be observed and applied in the future." *King Manufacturing Co. v. City Council of Augusta, supra,* 277 U.S. at 103, 104. Noting that the order was issued in accordance with and in implementation of legislative policy, this Court found a state court order to be a "statute" within the meaning of 28 U.S.C. § 1257(2). *Lathrop v. Donohoe,* 367 U.S. 820 (1961). Only recently this Court found to be a "statute" a City's comprehensive program to preserve historic landmarks by controlling development on such sites, which enactments were the implementation of state public policy to preserve areas with special historical or aesthetic interest. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 108 (1978).

Applying these precedents to the instant case, it is unmistakably clear that regulations and ordinances challenged by property owner are "statutes" within the meaning of 28 U.S.C. § 1257(2). The California Legislature has declared that the preservation of open-space land is a necessary and important policy of the state and that all regions of the state are to coordinate and implement plans for the conservation and preservation of open-space land. California Government Code § 65561, J.S.App. K-5. California Government Code § 65700

provides that charter cities shall adopt a general plan with certain mandatory elements, one of which must be an open space element, as provided by Government Code § 65300 and § 65560 et seq. (J.S. App. K-5, 6, 7). The open-space element adopted by the City mandates the preservation of open-space, and the City's zoning ordinances, which the trial court found to be consistent with the open-space element, (J.S.App. A-8, B-6) implement the expressed state legislative policy.

The property owner has consistently challenged through the entire course of this litigation, the validity of these "state statutes" as being repugnant to the United States Constitution.

2. The State Court Did Uphold The Validity Of The Statutes Against The Allegation That They Were Repugnant To The Federal Constitution.

To argue, as the City does, that the decision of the California Court of Appeal in this case did not "validate" the challenged statutes (Motion 7), misconceives the actual holding of the court below and ignores the interpretation this Court has given to that term in 28 U.S.C. § 1257(2) ("the decision is in favor of [the] validity of [the statute]").

For purposes of appeal, the "validity" of a statute is sustained when the state court finds, implicity or explicitly, that the challenged statute is consistent with the Constitution. The City either misunderstands or mistakes the holding of this Court in *Wilson v. Cook*, 327 U.S. 474 (1975) if it cites the case for any other proposition. The Court in *Wilson v. Cook* specifically held that what is necessary to satisfy this mandatory jurisdictional requirement is that:

> "the question of the validity under federal law of the state law, as construed and applied, has either been presented for decision [citations omitted] or has in fact been decided by it. . . ." 327 U.S. at 840.

As long as the challenge to the statute has been made, the state court's language need not be explicit, and in fact, the court can be completely silent, and as long as the statute is upheld, the court has necessarily rejected the objection. *See Largent v. Texas,* 318 U.S. 418 (1943); *Lawrence v. State Tax Commission,* 286 U.S. 276 (1932).

In the case before this Court, the lower court found after a full trial that the ordinances and regulations challenged were invalid "within the meaning of the . . . United States constitution []" (J.S.App. A-8, 9) and awarded compensation. The Court of Appeal in its original review affirmed this finding. J.S. App. B-8. The case was later returned to the Court of Appeal by the California Supreme Court to be "reconsidered" in light of its recent decision of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979). J.S.App. E. In *Agins* the California Supreme Court had addressed substantially the same issues as were involved in the instant case, including the allegations that such ordinances and regulations were repugnant to the Fifth Amendment of the United States Constitution. The California Supreme Court sustained the validity of the City of Tiburon's open space ordinances against this claim, holding that the property owner was not entitled to compensation. J.S.App. F. When the Court of Appeal reconsidered this case in light of *Agins*, it held that the ordinances and regulations did not entitle the property owner to compensation. J.S.App. G.

The state court has sustained or upheld the validity of the "statutes" against the contention that they are invalid as repugnant to the United States Constitution" [1]

THE CITY'S ARGUMENT THAT PROPERTY OWNER HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES IS TOTALLY ERRONEOUS

The City's erroneous contention that the decision by the Court of Appeal is in fact premised on the theory that property owner has failed to exhaust its available administrative remedies, and thus that the decision is based on adequate nonfederal grounds, is belied by the very language of the court's opinion and ignores the extensive discussion the court gave to this issue.

The Court of Appeal in its original decision (J.S.App. B-7, 8) dealt squarely and emphatically with the issue of exhaustion raised by the City and stated:

> "As to [the inverse condemnation] counts, there was no failure to exhaust any administrative remedy since none existed [citations omitted]. If the ordinance is allegedly void, then it is necessary to exhaust its administrative remedies . . . unless it would be futile to do so. . . . It would [be] futile to seek administrative

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[1] If this Court for any reason believes that review of this state court decision is not by appeal under 28 U.S.C. § 1257(2), property owner respectfully requests that its papers be considered as a petition for certiorari under 28 U.S.C. § 2103.

> review and was unnecessary for [property owner] to exhaust its adminstrative remedies in this regard." J.S.App. B-7, 8.

On reconsideration the court reaffirmed this when it stated:

> "Even assuming no use is acceptable to the City. . . . [property owner's] remedy is . . . not inverse condemnation." J.S.App. G-4.

THE CITY HAS FAILED TO DEMONSTRATE THAT THE NOVEL DECISION BELOW IS SUPPORTED BY FEDERAL PRECEDENT

1. The State Court Decision Is In Direct Conflict With Constitutional Principles And Federal Law.

The City, unable to demonstrate that the decision by the state court in this case, applying the *Agins* rationale, is supported by constitutional principles or federal precedent, unpersuasively attempts to avoid this fact by suggesting that the decision in this case is not as broad, and indeed as shocking, as property owner has demonstrated in its Jurisdictional Statement. Unfortunately for property owner, and all property owners in California and elsewhere if the decision is allowed to stand, the decision did hold that a property owner may never bring an inverse condemnation action seeking compensation in damages for an unlawful and excessive exercise of the police power in the land-use planning area.

One would almost think from reading the decision of the California Supreme Court in *Agins,* the Court of Appeal decision in the instant case, and the City's Motion, that the term "compensation" did not appear in the Fifth Amendment and

was instead an "optional" remedy which a state court could decide was or was not necessary.

The Fifth Amendment provides the "private property [shall not] be taken for public use, without just compensation." Despite this clear and explicit constitutional mandate, the California Supreme Court in *Agins* balanced the burdens of this remedy (compensation) against the benefits it perceived in another remedy (invalidation) and concluded compensation was "an inappropriate and undesirable remedy." J.S.App. F-9.

The rationale and justification of the *Agins* decision for rejecting compensation as a remedy was that the increasing value of land and the resulting fiscal burden to the state or city that would occur if compensation were required meant that "the scope of the application [of constitutional guaranties] must . . . contract" in order to meet the flexibility needs of community planners. J.S.App. F-10.

Thus although the trial court in the instant case found that the regulations were arbitrary, excessive and unconstitutional, that the City had commenced and then abandoned direct acquisition efforts; that the City's actions were motivated to achieve a public purpose, and that these regulations and actions deprived the property owner of all practical, beneficial or economic use of the land (J.S.App. A-7, 8), the Court of Appeal found that these actions -- although they "deprive[d] the owner of the beneficial use of his land"--do "not require compensation. . . ." J.S.App. G-4.

Not surprisingly, the City fails to cite a single case which would support this "optional" characteristic for the compensation remedy guaranteed to private property owners by the Fifth Amendment of the United States Constitution.

2. The Questions Presented In This Appeal Are Of Substantial Importance.

The state court in this case, premised on the *Agins* decision, has rewritten and abrogated the important property right guaranteed under the Fifth Amendment of the United States Constitution. The California courts have ignored the constitutional framework of the issue of excessive land-use regulation, abdicated their judicial duty and responsibility, and have decided that the "needs" of community planners can determine what is a constitutionally permissible land-use decision. J.S.App. F-11. The *Agins* court, unknowing or uncaring of the constitutional consequences, concluded that it would be a "usurpation of *legislative* power" for the court to decide compensation was to be paid if a community planner has determined the action is "necessary." J.S.App. F-11.

This Court's intervention is urgently required to reaffirm the principle eloquently expressed by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922):

> "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by shorter cut than the constitutional way of paying for the change."

CONCLUSION

For the foregoing reasons, and the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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